their nature furniture merely, which, though fastened to the walls for safety or convenience, did not lose their character as personal chattels, nor to houses or other structures built on the land of another with his consent, and under an agreement, express or implied, that they should continue the personal property of the party erecting them, notwithstanding that they had not been severed from the land when the action was brought. *Warner* v. *Kenning*, 25 Minn. 173; *Smith* v. *Benson*, 1 Hill 176; *Tifft* v. *Horton* 53 N. Y. 377; *Hill* v. *Sewald*, 53 Pa. St. 271; *Osgood* v. *Howard*, 6 Greenl. 452; *Davis* v. *Taylor*, 41 Ill. 405; *Adams* v. *Goddard*, 48 Me. 212; *Guthrie* v. *Jones*, 108 Mass. 191; *Finney* v. *Watkins*, 13 Mo. 291; *Vilas* v. *Mason*, 25 Wis. 312. Therefore, the plaintiffs having the right to remove this property, and defendant having upon request refused him permission to enter the building and remove it, an action would lie for damages for wrongful conversion, notwithstanding the fact that the property had not been dissevered from the realty.

Order affirmed.

Supreme Court of Minnesota.

SHAPERIA *v.* BARRY.

A wooden platform was erected for trade purposes, in defendant's building, by a tenant who, becoming insolvent, assigned all his property, including his term and the said platform, to the plaintiff for the benefit of his creditors. Plaintiff, with defendant's consent, assigned the term to a third party, but reserved the platform, and the right to enter and remove it. Upon entering for that purpose within a reasonable time, the defendant claimed to own the platform, and threatened to have plaintiff arrested for stealing, if he removed it. *Held*, that an action lay against the defendant, the owner of the building, for the wrongful conversion of the platform, notwithstanding it was still annexed to the building.

APPEAL from judgment of the Municipal Court of the city of St. Paul.

Walsh & Goforth, and *J. W. Willis*, for appellant.

O'Brien & Eller, for respondent.

MITCHELL, J.—This was an action for the wrongful conversion of a wooden platform, the alleged personal property of the plaintiff. The question for consideration is whether the findings of fact of the court below are sustained by the evidence. Upon examination we

think the evidence reasonably tends to prove the following state of facts, to-wit: That the platform in question was erected in defendant's building by Finkelstein & Co., his tenants, while occupying it as a furniture store; that they erected it with the knowledge and consent of defendant, and at their own expense, to be used in displaying their goods; that it was fastened to four scantlings, which were nailed to the walls of the building, the stairs to it being fastened at one end to the platform and at the other end to the floor; that although it could not be removed without being taken apart, yet it was capable of being severed and taken away without any great injury to the building.

Finkelstein & Co. having become insolvent during the term of their lease, executed to plaintiff a general assignment for the benefit of creditors of all their property, including their lease of the building and the platform in controversy. The plaintiff, with consent of defendant, assigned the unexpired term of the lease to one Walsh, but reserving the platform, there being at the time an understanding between him, defendant, and Walsh, that he could come and take it away at any time; that within a reasonable time the plaintiff came and entered the building for the purpose of removing it, when defendant claimed it as his own property, and threatened to have him arrested for stealing if he took it.

We think that this was sufficient to justify the court in finding that in view of the relation of the parties as landlord and tenant, and in the absence of any express agreement to the contrary, the platform did not become a part of the realty, but remained the personal property of the tenant, with the right of removal, and that this right had not terminated when plaintiff attempted to exercise it. We also think that the conduct of defendant when plaintiff attempted to remove the property was equivalent to a refusal to permit him to do so, and obviated the necessity of any formal demand for it by plaintiff. Under those circumstances an action for the wrongful conversion of the property will lie against defendant, although it has never been severed from the building. *Stout* v. *Stoppel*, *ante*. Judgment affirmed.

GILFILLAN, C. J., being absent at the argument of this case on account of illness, took no part in the decision.

The principal case of *Darrah* v. *Baird*, is so clearly correct, both upon principle and authority, that the citation of authorities would seem superfluous, but

for the fact that other courts have come to a contrary conclusion upon the same point. Wherever the common-law forms of action are retained, the action of trover lies only for the conversion of personal chattels. Tenant's fixtures, including trade fixtures, during their annexation, have generally been considered as part of the land, though severable by the tenant; and hence it has been generally held that during the existence of such annexation trover will not lie for their conversion: *Ex parte Quincy*, 1 Atk. 478, per Lord HARDWICKE: *Roffey* v. *Henderson*, 17 Q. B. 574; *Colegrave* v. *Dias Santos*, 2 B. & C. 76; *Longstaff* v. v. *Meagoe*, 2 Ad. & E. 167; *Raddin* v. *Arnold*, 116 Mass. 270; *Guthrie* v. *Jones*, 108 Id. 191; *Prescott* v. *Wells*, 3 Nev. 82; *Pierce* v. *Goddard*, 22 Pick. 559; *Overton* v. *Williston*, 31 Pa. St. 155; and that neither a tenant nor his assignee can maintain trover against the landlord, or an incoming tenant, for the recovery of fixtures left by him annexed to the demised premises after the expiration of the tenancy: *Lyde* v. *Russell*, 1 B. & Ad. 394; *Minshall* v. *Lloyd*, 2 M. & W. 450; *Wilde* v. *Waters*, 16 C. B. 637; *Roffey* v. *Henderson*, 17 Q. B. 574; *Davis* v. *Buffum*, 51 Me. 160; *Stockwell* v. *Marks*, 17 Me. 455; *Preston* v. *Briggs*, 16 Vt. 129; *Ex parte Reynal*, 2 M., D. & De G. 461. There are some cases, however, where tenants' fixtures were considered by the court as personalty, in which the rule is understood to be otherwise. See *Moore* v. *Wood*, 12 Abb. Pr. 393; *Vilas* v. *Mason*, 25 Wis. 327; *Miller* v. *Baker*, 1 Met. 27; *Peck* v. *Knox*, 1 Sweeney 311; *Finney* v. *Watkins*, 13 Mo. 291. Granting the premises assumed in these cases, that as between landlord and tenant, fixtures removable by the tenant are personal property, the conclusion that trover lies, follows naturally enough. The cases, however, are open to the criticism that their premises are incorrect, and opposed to the weight of authority. It is a rule of great antiquity that whatever is affixed to the soil becomes a part of the realty, and subject to the same rules of law as the soil itself: Broom's Leg. Max. 401; 10 Hen. VII., 2 b; 20 Hen. VII. 13; 21 Hen. VII. 26; Co. Lit. 53, a.; Bract. Lib. 2, ch. 2, §§ 4, 6, fol. 9 b, 10; Fleta, Lib. 3, c. 2, § 12, fol. 176; Inst. 2, 1, 30, (Sandars' ed.); D. 41, 1, 7, 12. Such being the rule, the right of removal conferred by law upon one not the owner of the soil, but who has, for some purpose of his own, made an annexation thereto more or less temporary, arises not merely from his interest in and dominion over the land, but is a special privilege conferred by the law in certain cases, from reasons of public policy, upon certain classes of persons, in derogation of what would otherwise be the rights of the owner of the soil. The nature of this right of removal has been explained in two ways: by supposing that the chattel nature of the thing is preserved after its annexation, or by considering that the thing ceases to be a chattel by being affixed to the land, and becomes realty, but reducible again to a chattel state by separation from the realty: Ferard Fix. 10. There is some confusion and looseness of expression among the authorities on this subject, occasioned, probably, by the fact that in some relations, and for some purposes, as in favor of the execution creditors, or the executors of a tenant, the chattel nature of the thing is not lost by its annexation. For many, if not most purposes, however, during the continuance of the annexation, the thing annexed is treated as a parcel of the realty; and though it is in the power of the party making the annexation to reduce it again to the chattel state, by severance, yet, till so severed, it remains a part of the realty. See, generally, *Lee* v. *Risdon*, 7 Taunt. 191; *Hallen* v. *Runder*, 1 Cr., M. & R. 275; *Mackintosh* v. *Trotter*, 3 M. & W. 184; *Minshall*

v. *Lloyd*, 2 M. & W. 450; *Dumergue* v. *Rumsey*, 2 H. & C. 790; *Holland* v. *Hodgson*, L. R., 7 C. P. 336; *Boyd* v. *Shorrock*, L. R., 5 Eq. 78; *Barnett* v. *Lucas*, 5 In. Com. Law 140; *Lee* v. *Gaskell*, 45 L. J. (Q. B. D.) 540; *Bliss* v. *Whitney*, 9 Allen 114; *Raddin* v. *Arnold*, 116 Mass. 270; *Guthrie* v. *Jones*, 108 Id. 191; *Preston* v. *Briggs*, 16 Vt. 129; *Prescott* v. *Wells*, 3 Nev. 82. In *Minshall* v. *Lloyd*, *sup.*, PARKE, B., said: "The principle of law is that '*quicquid solo plantatur solo cedit.*' The right of a tenant is only to remove during his term the fixtures he may have put up, and so to make them cease to be any longer fixtures. That right of the tenant enables the sheriff to take them under a writ for the benefit of the tenant's creditors. I assent to the doctrine laid down in *Coombs* v. *Beaumont*, 5 B. & Ad. 72, and *Boydell* v. *McMichael*, 1 C., M. & R. 177, that such fixtures are not goods and chattels within the bankrupt law, though they are goods and chattels when made such by the tenant's severance, or for the benefit of execution creditors."

The overwhelming weight of authority being then that, as between landlord and tenant, fixtures during their annexation are to be considered as fixtures, there can be no doubt of the correctness of the principal case of *Darrah* v. *Baird*. The principal case of *Stout* v. *Stoppel*, also, in which the verdict of the jury negatived the relation of landlord and tenant, and established the fact that the things in controversy were annexed under a license and under an agreement that the plaintiff might remove them at pleasure, from which the deduction was made that they never became a part of the realty, is also unquestionably correct. See the cases collected in Ewell on Fixtures 66, 67. The same cannot be said, however, of the principal case of *Shaperia* v. *Barry*. In that case it appears that the relation of landlord and tenant did exist; and the platform in question was unquestionably a removable trade fixture. The complaint is not set out in full, but it is stated by the court, that the action was for the wrongful conversion of the platform as the personal property of the plaintiff. Now unquestionably even where the common-law forms of actions are retained, an action on the case would lie for wrongfully preventing the exercise of the right to sever and remove fixtures, and in such action the value of the fixtures as removed may be recovered: *London, &c., Loan Co.* v. *Drake*, 6 C. B. (N. S.) 798. If, in the principal case last mentioned, the facts are stated specially in the complaint, it will be conceded that the plaintiff was entitled to recover; but, if, as appears to be the case, the complaint was simply for the conversion of goods and chattels, without specially setting out the facts constituting the alleged conversion, it is believed that the decision is clearly erroneous. We do not understand that the codes of procedure prevailing in the so-called code States, are intended to change the substantial rights of the parties or the nature of property. We suppose that in all those States a recovery must be had, if at all, according to the case stated in the complaint. If such is the case, we cannot understand how there can be a recovery in an action for the conversion of personal property only, for that which the proof shows was realty and not personalty. Granting the assumption of the court that it is personal property, the decision is correct; but we have shown that such an assumption is contrary to the great weight of authority; it is also unsupported by the case of *Stout* v. *Stoppel*, for in that case the property was clearly not a fixture at all, but mere personalty; and the rest of the case, as to the point now in question, is a mere *dictum*. The court, in *Shaperia* v. *Barry*, say that "in the absence of any express agreement to the contrary, the platform did not become a part of the realty," &c. We think that the rule is exactly the op-

posite, viz., that in the absence of any express agreement making the thing annexed personalty notwithstanding its annexation, it becomes a part of the realty during the time it is annexed, and that the right of the tenant is merely that of severance and removal. Upon the whole, judging from what appears upon the face of the opinion, for we have not access to the pleadings in the case, we do not think the case of *Shaperia* v. *Barry* is well decided. It would be quite as logical to say that replevin would lie for realty, as that realty may be converted. The case seems to us to be a departure from well settled principles which, if made at all, should be made by legislative and not judicial authority.

MARSHALL D. EWELL.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF GEORGIA.[2]

SUPREME COURT OF NEW JERSEY.[3]

SUPREME COURT OF RHODE ISLAND.[4]

SUPREME COURT OF WISCONSIN.[5]

ACTION.

Selling Goods as the Manufacture of Another.—A declaration charging defendants with fraudulently and falsely selling goods of his own fabrication as the manufacture of the plaintiff, by which the plaintiff was deprived of sales in the market, sets forth an actionable injury: "*The Mrs. G. B. Miller & Co. Tobacco Manufactory*" v. *Commerce*, 16 Vroom.

ASSIGNMENT.

Validity.—An assignment is not void in law, because it does not direct that the creditors shall be paid *pro rata* in case there be not enough of the proceeds of the assigned property to pay them in full. Unless otherwise directed by the express terms of the assignment, the law imposes that duty upon the assignee: *Lindsay* v. *Guy*, 57 Wis.

For Creditors—Remedy for Mismanagement by Assignee.—Where insolvent debtors have made an assignment for the benefit of their creditors, setting out in the deed of assignment the names of such creditors and the amounts due them, the persons so named are *cestuis que trust*, and although they may not be preferred creditors, they are interested in a just administration of the trust, and are entitled to equitable

---

[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1882. The cases will probably appear in 107 Otto.

[2] From J. H. Lumpkin, Esq., Reporter. The cases will probably appear in 67 or 68 Geo.

[3] From G. D. W. Vroom, Esq., Reporter; to appear in 16 Vroom.

[4] From Arnold Green, Esq., Reporter; to appear in 14 Rhode Island.

[5] From Hon. O. M. Conover, Reporter; to appear in 57 Wisconsin.